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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

ZELDA BAKER JENNINGS ET AL.¹

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 11, 1940.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 48-50) is unreported. The opinion of

¹ The taxpayers involved herein and the deficiencies assessed against them are as follows:

Clyde Jennings and his wife, Zelda Baker Jennings	\$352.54 each
J. O. Sheffield and his wife, Lillian Sheffield	93.95 each
L. K. Mason	3,013.62

the Circuit Court of Appeals (R. 61-64) is reported in 110 F. (2d) 945.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 11, 1940. (R. 64.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayers may offset personal losses from gambling operations against their distributive shares of partnership gains from similar operations.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 6-7.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 49-50), may be summarized as follows:

In 1936, taxpayers were members of partnerships, each of which derived a portion of its income from gambling operations. The taxpayers also engaged in gambling operations in their individual capacities, which resulted in net losses. The distributive share of each taxpayer of partnership gains from gambling transactions exceeded the amounts of losses sustained by the taxpayers in their individual gambling operations. (R. 49.)

The Commissioner refused to allow individual gambling losses to be offset against distributive partnership income attributable to gambling. (R. 50.) The Board of Tax Appeals sustained the action of the Commissioner, but the Circuit Court of Appeals reversed, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, under Section 23 (g) of the Revenue Act of 1936, the taxpayers may offset individual losses from gambling operations against their distributive shares of partnership gains from such operations.
2. In holding that a partner's distributive share of partnership profits from gambling operations retains its character as such in the calculation of the partner's individual tax liability.
3. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals, one judge dissenting, held that, under Section 23 (g) of the Revenue Act of 1936, *infra*, which permits the deduction of losses from wagering transactions only to the extent of the gains from such transactions, the taxpayers could deduct individual gambling losses from their distributive shares of partnership profits derived from gambling operations. In reaching that result, the court held that partner-

ship income, when distributed to the individual partners, retains the special characteristics which it had as partnership income. The decision below is thus in conflict, in principle, with *Neuberger v. Commissioner*, 104 F. (2d) 649 (C. C. A. 2d), where it was held that individual non-capital losses could not be deducted from the taxpayer's distributive share of partnership non-capital gains under the analogous provisions of Section 23 (r) of the Revenue Act of 1932. Although this Court had originally denied taxpayer's petition for certiorari in the *Neuberger* case (308 U. S. 623), certiorari was subsequently granted on May 27, 1940, after the decision below was rendered, upon taxpayer's petition for rehearing alleging conflict with the instant case.

The decision below is similarly in conflict, in principle, with the following decisions: *Johnston v. Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), certiorari denied, 301 U. S. 683; *Klingenstien v. United States*, 18 F. Supp. 1015 (C. Cls.), certiorari denied, 302 U. S. 716; *Winmill v. Commissioner*, 93 F. (2d) 494 (C. C. A. 2d), reversed on other grounds, 305 U. S. 79.

While Section 182 (a) of the Revenue Act of 1938 specifically allows, for 1938 and subsequent years, the type of deduction involved in the *Neuberger* case, the instant question remains one of continuing importance, for there is no provision corresponding to Section 182 (a) relating to wagering transactions.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY, 1940.